

## MEMORANDUM

TO: Western Massachusetts Electric Company; D.T.E. 01-36 & D.T.E. 02-20  
Service List  
FROM: Kevin F. Penders, Hearing Officer  
DATE: November 18, 2002  
RE: Hearing Officer Ruling on Petition to Intervene of Alternate Power Source, Inc.;  
Amended Service List  
CC: Commission  
Mary Cottrell, Secretary  
Paul G. Afonso, General Counsel

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### **HEARING OFFICER RULING ON PETITION TO INTERVENE OF ALTERNATE POWER SOURCE, INC.**

#### A. Procedural History

On March 30, 2001, pursuant to G.L. c. 164, § 1A(a), 220 C.M.R. § 11.03(4) and the Restructuring Settlement Agreement approved by the Department of Telecommunications and Energy ("Department") in Western Massachusetts Electric Company, D.T.E. 97-120-E (2000), Western Massachusetts Electric Company ("WMECo" or "Company") filed with the Department its 2001 reconciliation filing for the calendar year 2000. That matter was docketed as D.T.E. 01-36. On March 29, 2002, WMECo filed its reconciliation filing for the calendar year 2001. That matter was docketed as D.T.E. 02-20. On July 9, 2002, WMECo amended its filings in D.T.E. 01-36 and D.T.E. 02-20 to reflect the Department's directives in Western Massachusetts Electric Company, D.T.E. 00-33 (2002).

On April 26, 2002, Alternate Power Source, Inc. ("APS") filed with the Department a petition to intervene entitled "Intervention, Protests and Comments" ("Petition") signed by APS' president, Stephen M. Tuleja. APS argues that it has a direct financial interest because it received payment for generation supply service to retail customers in 2000 which could be affected by the proposed reconciliation in D.T.E. 02-20 (Petition at 1). Specifically, APS contends that the standard offer service costs reported in WMECo's filing do not equate with the payments made to APS and do not include any provision for additional sales APS alleges are due it (*id.*). APS argues that no other party could adequately represent its financial interests in this proceeding (*id.*). Further, APS requests that the Department: (1) reject the reconciliation

of standard offer service (“SOS”), transmission adjustments, and default service as filed and order a new reconciliation regarding transmission congestion costs, SOS costs and revenues for calendar year 2000; and (2) address several issues with regard to congestion charges and payments (Petition at 6).

On May 2, 2002, WMECo objected to the Petition as premature. On May 7, 2002, APS responded to WMECo’s objection, stating that it is concerned only with the standard offer and transmission reconciliation components of the Company’s filing. APS renewed its request for intervention, and requested that the Department conduct separate proceedings for: (1) the standard offer and transmission reconciliation and (2) the transition reconciliation (APS Letter dated May 7, 2002).

The Department issued an Order of Notice (“Notice”) on July 16, 2002. WMECo was required to serve a copy of the Notice on the Chairmen, Board of Selectmen, Mayors, Town Clerks, and City Clerks of the cities and towns in the Company’s service area as well as to provide a copy of the Notice to all participants in D.T.E. 97-120, D.T.E. 00-33, and Western Massachusetts Electric Company, D.T.E. 01-101. The Notice specifically stated that any petitions to intervene must be received by the Department no later than the close of business August 6, 2002.

In accordance with the Notice, the Department conducted its public hearing and procedural conference (“Hearing”) on August 13, 2002. The Company and the Office of the Attorney General (“Attorney General”) were present at the Hearing, and the Company provided its return of service and publication at that time (Tr. at 4-5). The Department denied APS’ request to bifurcate the proceeding, and consolidated the D.T.E. 01-36 and D.T.E. 02-20 dockets for investigation (id. at 15). APS did not attend the Hearing; however, WMECo raised several additional objections to the APS Petition (id. at 10, 11-12, 13-14). First, WMECo argued that the Petition is untimely since it predated the Department’s Notice (id. at 11). Second, WMECo contends that the issues raised by APS have already been raised in court or at the Federal Energy Regulatory Commission (“FERC”) (id. at 11-12).<sup>1</sup> Third, WMECo argues that APS’ Petition is improper since it was not filed by an attorney (id. at 13-14). The Attorney General did not object to APS’ Petition (id. at 15).

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<sup>1</sup> APS has brought civil litigation in Norfolk Superior Court for payment in the amount of \$1,678,331.78, representing certain congestion charges assessed against WMECo by the Independent Systems Operator (“ISO”). That matter is still pending. APS has also brought an inquiry before FERC, seeking direction regarding whether transmission congestion charges should be recorded in Account 565, Transmission of Electricity by Others, or Account 555, Purchased Power. By letter dated July 2, 2002, FERC stated that as an accounting rule, WMECo could classify congestion costs as either Account 555 or Account 565 costs. FERC Docket No. AC02-28-000.

B. Standard of Review

The Department's regulations require that a petition to intervene describe how the petitioner is substantially and specifically affected by a proceeding. 220 C.M.R. §1.03(1)(b); see also G.L. c. 30A, § 10. In interpreting this standard, the Department has broad discretion in determining whether to allow participation, and the extent of participation, in Department proceedings. Attorney General v. Department of Public Utilities, 390 Mass. 208, 216 (1983); Boston Edison Company v. Department of Public Utilities, 375 Mass. 1, 45 (1978) (with regard to intervenors, the Department has broad but not unlimited discretion), cert. denied, 439 U.S. 921 (1978); see also Robinson v. Department of Public Utilities, 835 F. 2d 19 (1st Cir. 1987). The Department may allow persons not substantially and specifically affected to participate in proceedings for limited purposes. G.L. c. 30A, § 10; 220 C.M.R. § 1.03(1)(e); Boston Edison, 375 Mass. 1, 45. A petitioner must demonstrate a sufficient interest in a proceeding before the Department will exercise its discretion and grant limited participation. Boston Edison, 375 Mass. 1, 45. The Department is not required to allow all petitioners seeking intervenor status to participate in proceedings. Id.

C. Analysis & Findings

In ruling on the Petition, the threshold issue is whether a non-attorney may represent a corporation before the Department.<sup>2</sup> The Attorney General has ruled that non-lawyers may only appear as representatives of parties to adjudicatory hearings provided that appropriate rules are adopted to permit their appearance. Opinion of the Attorney General at 136 (December 24, 1975). The Department has no such regulation. 220 C.M.R. § 1.03(1)(a) provides that: “any person who desires to participate in a proceeding shall file a written petition for leave to intervene or participate in the proceeding.” Therefore, the Department must determine whether Mr. Tuleja, a non-attorney, properly filed a Petition on behalf of a corporation.

The term “person” is not defined in the Department’s regulations and is only referenced in G.L. c. 30A, § 1, to “include[] all political subdivisions of the [C]ommonwealth.” While the Massachusetts Supreme Judicial Court has held that G.L. c. 30A grants the Department broad discretion with regard to intervenors, it has also found that such discretion is not unlimited. Boston Edison, 375 Mass. 1, 45, citing Newton v. Department of Public Utilities, 339 Mass. 535, 543 n. 1 (1959).

The Court has held that, while an interested party may seek to intervene and represent himself in a pro se manner, such an intervention is improper when non-lawyers attempt to represent the interests of others. Boston Edison, 375 Mass. 1, 45. Further, in Varney Enterprises, Inc. v. WMF, Inc., 402 Mass. 79 (1988), the Court held that with the exception of small claims matters, a corporation may not be represented in judicial proceedings by a

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<sup>2</sup> Upon information and belief, Mr. Tuleja is not an attorney authorized to practice law in the Commonwealth.

corporate officer who is not an attorney licensed to practice law in the Commonwealth. Varney, 402 Mass. 79. The Court states that while there is no injustice in allowing natural persons to appear pro se, those who receive the advantages of incorporation should bear the burden of hiring counsel to sue or defend in court. Varney, 402 Mass. 79, 82, citing Walacavage v. Excell 2000, Inc., 331 Pa.Super. 137, 142-143, 480 A.2d 281 (1984). Lastly, the court in Varney held that a person appearing pro se does not represent another, as does a person appearing for a corporation. Varney, 402 Mass. 79, 82. The Court has dismissed at least one action brought against the Department raising jurisdictional issues similar to Varney. See DLS Energy v. Department of Public Utilities, No. SJ-94-0051 (1994).<sup>3</sup> Mr. Tuleja, as president of APS, filed this Petition with the Department on APS' behalf. Therefore, in accordance with Department regulations and court precedent, I find that this Petition was filed without representation by an attorney, and deny the Petition as filed.

The Company raises two additional contentions. First, with regard to the argument that the Petition was untimely, the Department's regulations address late-filed petitions to intervene, not those prematurely filed. See 220 C.M.R. §§ 1.01(4) and 1.03(1). The regulations state that any person may file a written petition for leave to intervene or to participate in a proceeding. While the Petition was filed prior to the Notice, there is no indication in the regulations that such a petition is untimely or should be denied as such.

Second, the Company argues that APS is pursuing similar claims in court and at FERC, making its filing in this proceeding moot (Tr. at 12-14). The Department would not allow APS to re-litigate those facts and issues already properly resolved in other jurisdictions. The Company has presented evidence that the issues APS seeks to resolve regarding the Company's accounting practices for congestion costs have been addressed in part by FERC's July 2, 2002 letter (id. at 12). Therefore, the Department will not address any questions regarding the appropriateness of FERC's decision on the classification of congestions costs.

Turning to the merits of the Petition, I find that APS has failed to demonstrate that its interests will not be adequately represented by the Attorney General's participation in this proceeding. When ruling on a petition to intervene or participate, a Hearing Officer may consider, "among other factors, . . . whether the petition's interests are unique and cannot be raised by any other petitioner, . . . and may limit intervention and participation accordingly." Eastern Edison Company, D.P.U. 96-24 (July 9, 1997) at 4-5; citing Hearing Officer's Ruling on Petitions to Intervene, D.P.U. 92-111 (1992); Hearing Officer's Ruling, D.P.U. 90-284, at 3 (April 24, 1991); Interlocutory Order on Appeal of Hearing Officer Ruling, D.P.U. 88-250,

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<sup>3</sup> In DLS Energy v. Department of Public Utilities, DLS' president, David Smith, filed a petition for judicial review at the Supreme Judicial Court, seeking an appeal of a Department order. The Attorney General, on behalf of the Department, sought and was granted a motion to dismiss for lack of subject matter jurisdiction under Massachusetts Rule 12(b)(6) on the grounds that Mr. Smith's petition on behalf of DLS was without representation by an attorney and therefore void.

at 5,6 (March 21, 1989). Mr. Tuleja (both individually and as a representative of APS), has not adequately demonstrated that the interests of APS will not be adequately addressed by the Attorney General. See e.g., Robinson v. Department of Public Utilities, 416 Mass. 668, 673, 624 N.E.2d 951, 954-955 (1993); New England Telephone and Telegraph Company, D.P.U. 91-30, at 3 (May 31, 1991); New England Telephone and Telegraph Company, D.P.U. 94-50 Hearing Officer Ruling at 4 (June 21, 1994); Boston Edison Company, D.P.U. 96-23, at 15 (September 8, 1997); Boston Edison Company, D.P.U. 97-63 at 16 (September 2, 1997). Further, several of the issues raised by APS are beyond the Department's jurisdiction, beyond the scope of this proceeding, or both. Most notably, the issues raised by APS with regard to the accounting practices dictated by FERC for congestion costs are reserved to the regulation and oversight of FERC. I will, however, grant APS status as a limited participant. As such, APS, after having obtained representation by counsel, will be entitled to file briefs and be placed on the service list.

#### D. Ruling

For all of the above reasons, the Petition for Intervention, Protests and Comments of Alternate Power Source, Inc., with regard to D.T.E. 02-20, as filed by APS' president, Stephen M. Tuleja, is hereby DENIED. Alternate Power Source, Inc., is granted limited participant status and accordingly shall be entitled to file briefs and to receive copies of all filings, pleadings, and submissions made in this proceeding.

Under the provisions of 220 C.M.R., § 1.06(d)(3), any affected person may appeal this ruling to the Commission by filing a written appeal with supporting documentation by November 25, 2002. A copy of this ruling must accompany any appeal. A response to any appeal must be filed by December 3, 2002.

**AMENDED SERVICE LIST**

Effective November 18, 2002

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